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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 263

C. D. WALKER, AS TRUSTEE IN BANKRUPTCY OF THE LAKE NURSERY COMPANY, BANKRUPT,

Petitioner,

vs.

L. MAXCY, INC., A CORPORATION UNDER THE LAWS OF FLORIDA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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C. P. DICKINSON,
Of Counsel.

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No. 263

C. D. WALKER, AS TRUSTEE IN BANKRUPTCY OF THE LAKE NURSERY COMPANY, BANKRUPT,

Petitioner,

vs.

L. MAXCY, INC., A CORPORATION UNDER THE LAWS OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A.

Summary Statement of the Matter Involved.

The petitioner, Trustee in Bankruptcy of the Lake Nursery Company, under date of the 9th day of August, 1939, filed his report and verified petition for fixing and allowing costs in connection with the sale of the property of

the bankrupt, and the costs of preservation of said property during the pendency of the proceedings in Bankruptcy (R. 29-35) following the sale of said property free and clear of liens, which had been previously ordered in the Bankruptcy proceedings. The petition set forth the expenditures which had been made in connection with the care and preservation of the property and the services which had been performed by the officers of the Court in connection with said sale and showed that the sum of $12,181.35 of the common funds of the Bankrupt Estate had been used in preserving the property which inured to the benefit of the lien-holders. The petition further set forth that no part of the costs of the proceedings for the sale of the property had been paid, and that the petitioner had on hand only $78.90. The petition specifically prayed that the Court assess an amount against the lien-holder, L. Maxcy, Inc. (who was purchaser at the sale), equal to what would be a reasonable amount to charge for the foreclosure of the lien of L. Maxcy, Inc., and to further have fixed the costs of preservation, and to have the same assessed against the proceeds realized from the sale as a prior charge upon the funds so realized, and to have said sum so fixed paid into the Registry of the Court before the delivery of the deed to L. Maxcy, Inc. (the purchaser).

L. Maxcy, Inc. filed objections to the allowance of the petition (R. 38-43), but offered no testimony in support of the objections filed. At the hearing had on the 15th day of November, 1939, the testimony of the Trustee in Bankruptcy was received in support of his petition and he was duly cross-examined by the attorneys for L. Maxcy, Inc. (R. 43-96). The Trustee, under date of July 5th, 1939 had filed his report of sale showing that the property involved was purchased by L. Maxcy, Inc. for $52,500.00, subject to the confirmation of the Court, and further showing that the purchaser had stated at the time it made its bid that it

desired to pay said sum with its lien heretofore allowed, and subject to the terms and provisions of the order which had been made, providing for the fixing of the costs of preservation and of the proceedings, which said sum would have to be paid in cash in addition to the amount bid (R. 97-98) (pp. 8 of the order directing the sale specifically provided: "All questions of costs, fees and expenses arising in connection with this proceeding in bankruptcy are hereby reserved to be adjudicated and determined at the proper time and enforced by appropriate orders and proceedings") (R. 97).

On the 24th day of November, 1939 the Referee entered an order approving and confirming the sale of the property to L. Maxcy, Inc. and determining that the sum of $8,953.00 was a reasonable amount to be assessed and taxed against L. Maxcy, Inc. as costs of preservation of the property and costs of the proceedings had for the sale of said property, and finding that such costs were comparable to the cost which would have been assessed in a State Court proceeding for foreclosure of the mortgage involved. The order further provided for distribution of said amount to the Referee for his costs and fees, and to the Trustee for his award of compensation and attorneys' fees for the Trustee's attorneys. The order further provided for the payment of certain Trustee's certificates which had been issued and were held by the First State Bank of Eustis, amounting to $2500.00 (R. 99-102).

L. Maxcy, Inc. filed petition for review of the aforesaid order, and the District Judge, under date of April 22, 1940, entered an order reversing the order of the Referee dated November 24, 1939 (R. 107-108). In the meantime L. Maxcy, Inc., under date of December 27, 1939 filed a motion in the District Court setting up among other things that there was a considerable amount of ripe citrus fruit on the property in question, and after offering to pay the $8,953.00

into the Registry of the Court to abide a determination of the costs, moved the Court to confirm the sale to it and to require the delivery of a deed to it. The District Court granted said motion and the sum of $8,953.00 was paid into the Registry of the Court and the deed delivered (R. 104-107).

Subsequently, under date of June 5, 1940 the Referee, after hearing, determined that the sum of $5500.00 was a reasonable sum to be taxed and assessed against L. Maxcy, Inc. for the costs and expenses of conducting the sale of the property, as a part of the costs and expenses to be assessed against L. Maxcy, Inc., comparable to the reasonable costs, and not in excess of, the sum it would have cost to foreclose the lien of L. Maxcy, Inc. in a State Court (R. 112-113).

On the 14th day of June, 1940, L. Maxcy, Inc. filed a petition for review of said order (R. 114-115) and upon the same date certificate for review was filed by the Referee (R. 116-117).

No further proceedings were taken by L. Maxcy, Inc. and on the 18th day of July, 1940, the Trustee filed a motion to dismiss the petition and certificate of review as required by Local Rule 22 of the United States District Court, in and for the Southern District of Florida, and to have the order of the Referee affirmed. This rule in question provides that petitions for review shall within twenty (20) days from the filing of the certificate of review be called up for hearing before the Judge, otherwise such petition for review shall stand dismissed unless for cause shown the time for hearing shall be extended. L. Maxcy, Inc., after procuring its deed and after the certificate of review had been filed, waited for 34 days, 14 days more than the time prescribed by Local Rule 22, without calling the petition up for hearing and without obtaining an extension of time as required by the Rules.

On August 22, 1940, the District Judge, after hearing on the motion to dismiss petition for review, filed by the Trustee, entered an order granting said motion to dismiss and directing the distribution of the funds deposited in the Registry of the Court in accordance with the Referee's order of June 5, 1940, and affirmed the action of the Referee (R. 122-123).

On the 30th day of August, 1940, L. Maxcy, Inc. entered its appeal to the Circuit Court of Appeals for the Fifth Circuit at New Orleans (R. 123) appealing from the adverse ruling of the District Judge dismissing its petition for review.

The Circuit Court of Appeals under date of May 2, 1941, rendered an Opinion (R. 136-138) reversing the District Judge and directing that the sum of $500.00 and no more be assessed against L. Maxcy, Inc. as its proper share of the costs of the proceedings.

Under date of May 22nd, 1941, the Trustee in Bankruptcy filed petition for rehearing (R. 140-143) which said petition for rehearing the Circuit Court of Appeals denied under date of May 31st, 1941 (R. 144). Thereafter, under date of June 12, 1941, Motion was filed for order staying issuance of Mandate in the Circuit Court of Appeals, which motion was granted.

Precise Questions Involved for Determination.

1. WHERE A LOCAL RULE OF THE DISTRICT COURT PROVIDES THAT ALL PETITIONS FOR REVIEW OF A REFEREE'S ORDER IN BANKRUPTCY SHALL BE CALLED UP BY THE PETITIONER FOR HEARING BEFORE THE JUDGE WITHIN TWENTY DAYS FROM THE FILING OF THE CERTIFICATE OF REVIEW BY THE REFEREE, OTHERWISE SUCH PETITION FOR REVIEW SHOULD STAND DISMISSED, MAY A PARTY LITIGANT IGNORE THE RULE AND LATER AVAIL HIMSELF OF AN APPEAL?

2. WHERE A LIENHOLDER AVAILS ITSELF OF THE BENEFITS OF A SALE FREE AND CLEAR OF LIENS, AND THROUGH SAID PROCEEDINGS PROCURES TITLE TO THE PROPERTY INVOLVED BELONGING TO THE BANKRUPT ESTATE AND COVERED BY ITS

LIEN, SHOULD THE LIENHOLDER BE REQUIRED TO PAY THE REASONABLE COSTS OF THE PROCEEDINGS HAD FOR THE SALE OF SAID PROPERTY AS FIXED AND DETERMINED BY THE COURT?

3. ARE THE TRUSTEE IN BANKRUPTCY AND THE REFEREE WHO CONDUCT THE SALE FREE AND CLEAR OF LIENS OF PROPERTY BELONGING TO THE BANKRUPT ESTATE ENTITLED TO THEIR PRESCRIBED COMMISSIONS AND FEES UNDER THE BANKRUPTCY ACT WHERE THE LIENHOLDER PURCHASES THE PROPERTY WITH HIS LIEN AS A PART OF THE PURCHASE PRICE, AND IF SO, MAY SUCH FEES BE CHARGED TO THE LIENHOLDER WHERE THERE ARE NO FUNDS IN THE GENERAL ESTATE OUT OF WHICH SUCH FEES MAY BE PAID?

4. UNDER SECTION 48 OF THE BANKRUPTCY ACT (11 U. S. C. A. PP. 76) WHICH PROVIDES THAT THE TRUSTEE IS ENTITLED TO A COMMISSION "on all monies disbursed or turned over to any person, including lienholders" MAY A LIENHOLDER WHO UTILIZES THE AMOUNT OF HIS LIEN IN PURCHASING PROPERTY OF THE BANKRUPT ESTATE SOLD FREE AND CLEAR OF LIENS UNDER ORDER OF THE BANKRUPTCY COURT BE REQUIRED TO PAY THE TRUSTEES' COMMISSIONS AS FIXED BY THE BANKRUPTCY ACT ON THE AMOUNT OF THE LIEN ALLOWED BY THE BANKRUPTCY COURT AS PART OF THE PURCHASE PRICE?

5. (a) UNDER SECTION 2 (18) OF THE CHANDLER ACT, MAY A BANKRUPTCY COURT TAX AND ASSESS AGAINST A SECURITY HOLDER WHO REALIZES ON HIS SECURITY IN THE BANKRUPTCY PROCEEDINGS A PORTION OF THE COSTS AND EXPENSES INCIDENT TO THE PRESERVATION AND LIQUIDATION OF THE SECURITY INVOLVED?

(b) IF SO, IS THE SUM OF $5,500.00 A REASONABLE AMOUNT TO REQUIRE THE SECURITY HOLDER TO PAY WHERE THE PROPERTY INVOLVED CONSISTS OF A CITRUS GROVE WHICH REQUIRED CONSTANT CARE AND EXPENSE FOR ITS PRESERVATION BY THE BANKRUPTCY COURT FOR A PERIOD OF APPROXIMATELY THREE YEARS AT AN EXPENSE OF OVER $12,000.00 TO THE BANKRUPT ESTATE, AND WHERE THE SECURITY HOLDER REALIZES, IN ADDITION TO THE PROPERTY INVOLVED, A MATURED CITRUS CROP WHICH WAS GROWN ON THE PROPERTY BY THE TRUSTEE AT THE EXPENSE OF THE BANKRUPT ESTATE?

B.

Reasons Relied Upon for the Allowance of the Writ.

1.

The decision of said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial

proceedings as to call for the exercise of the Supreme Court of the United States' power of supervision in this:

(a) That said Appellate Court arbitrarily fixed the sum of $500.00 as the amount to be assessed against the lienholder, notwithstanding the fact that the Referee and the District Judge, based on the evidence, had determined the sum of $5500.00 as a reasonable amount to be assessed against the lienholder.

(b) The amount of $500.00 fixed by the Appellate Court is insufficient to cover the statutory fees and allowances of the Referee, Trustee and officers of the Court as prescribed by Sections 40 and 48 of the Chandler Act to say nothing of the other expenses and costs of the preservation and liquidation of the security involved.

(c) The effect of the decision of the Appellate Court as rendered would make a Court of charity of the Bankruptcy Court which is inconsistent with the paramount exclusive jurisdiction which the Court held and exercised over the property in question, and such decision is probably in conflict with the applicable decisions of this Court governing the province and jurisdiction of a Court of Bankruptcy.

2.

The decision of the Appellate Court failed to give effect to Rule 22 of the District Court Rules which requires a petition for review to be called up for hearing within twenty (20) days from the filing of the certificate of review by the Referee, and further provides that such petition for review should stand dismissed unless so called up.

The decision, therefore, is in conflict with the case of *Williamson* v. *Leith, et al.*, 36 F. (2d) 643 (C. C. A. 5th) interpreting said Local Rule.

The decision of the Appellate Court is also probably in conflict with decisions of Circuit Courts of Appeals on

similar rules, to-wit: *In re David,* 33 F. (2d) 748 (C. C. A. 3rd) which case holds that a similar rule supplemental to General Order 27 is exclusive.

The decision of the Appellate Court is also probably in conflict with the decision in the case of *Patents Process, Inc., et al.,* v. *Durst, et al.,* 69 F. (2d) 283 (C. C. A. 9th).

3.

The Appellate Court has decided an important question of Federal Law which has not been but which should be settled by the Supreme Court of the United States in this:

(a) Where the lienholder who has availed himself of the procedure in a Bankruptcy Court for the recovery of its debt by the sale free and clear of liens in the Bankruptcy Court and has accepted the benefits of the procedure of the Bankruptcy Court, should the lienholder be required to pay the reasonable costs of said proceedings for liquidation and preservation of the security involved?

(b) Whether the Referee's and Trustee's commissions as prescribed by the Chandler Act should be paid by the lienholder who avails himself of the procedure of the Bankruptcy Court where there are no funds in the general estate to pay the same?

(c) Whether a Bankruptcy Court may tax and assess against the lienholder the costs and expenses of conducting a sale free and clear of liens comparable to the costs of foreclosure in the State Court where the lienholder avails himself of the sale free and clear of liens and there are no funds in the general estate to pay the costs of such proceedings?

Virginia Securities Corporation v. *Patrick Orchards, Inc.,* 20 F. (2d) 78 (C. C. A. 4th Cir.)

4.

The decision of the Appellate Court vitally affects not only the local referee and trustee in question but the principles involved affect generally the Bankruptcy Courts, and to allow the decision to stand, particularly without clarification, would jeopardize the interests of the officials of the Bankruptcy Courts in general throughout the United States, and the decision of the Appellate Court interpreting the Chandler Act probably violates and is in contravention of the Act itself insofar as it prescribes fees and commissions of the referee and trustee.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and forward to this Court a full and complete transcript of the record in the proceeding in said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 9698 In Bankruptcy, *L. Maxcy, Inc., a Corporation under the laws of Florida, Appellant,* v. *C. D. Walker, as Trustee in Bankruptcy of the Bankrupt Estate of Lake Nursery Company, a Bankrupt, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as this Court may deem proper.

Dated, Orlando, Florida, July 9, A. D. 1941.

C. D. WALKER,
As Trustee in Bankruptcy of
Lake Nursery Company, Bankrupt.
By CLAUDE L. GRAY,
Attorney for Petitioner.

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